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No. 90-88

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

HELEN PETERSON,
Petitioner,

vs.

KING TREE CENTER, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's grant of summary judgment in favor of Respondent?

STATEMENT OF CORPORATE AFFILIATION

At the time of Petitioner's employment, King Tree Center, Inc. was affiliated with the following corporate entities by virtue of some common ownership: Emery Medical Management Company, Hanover House, Inc., Pavillion Nursing Center North, Inc., Villa Convalescent Center, Inc., Copely Health Center, Inc., Baldwin Health Center, Inc., Northfield Health Center, Inc., Wexford Home Health Care, Inc., and Hanover Home Health Care, Inc. On October 10, 1989 the assets of King Tree Center, Inc. were sold to Health Care Strategies, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, King Tree Center, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Respondent King Tree Center ("King Tree") was a residential nursing care facility certified and licensed as an extended care and intermediate care facility. Petitioner, Helen Peterson, a black certified Accredited Medical Technician, was hired by King Tree as the Director of Medical Records on August 29, 1983. Petitioner remained in that position until she was discharged on March 24, 1986.

In her capacity as the Medical Records Director, Petitioner's primary responsibility was to maintain the medical records of King Tree. As detailed in her written job descrption, the position required that Petitioner ensure that the medical records of residents of King Tree were completed by the requisite personnel, and subsequently, kept up to date. Petitioner was discharged when it became clear that she was unable and unwilling to carry out her job responsibilities in a satisfactory manner.

Petitioner's job responsibilities were initially called into question after the Ohio Department of Health conducted an inspection of King Tree between March 19, 1985 and March 28, 1985. The Ohio Department of Health noted multiple violations in all of the departments at King Tree, including the Medical Records Department, and recommended revocation of King Tree's licensure to operate the facility. With respect to medical records, the Medical Records Department was cited for incomplete record keeping. As in the case of other King Tree personnel whose departments were cited, Petitioner was not named specifically in connection with the violations by the Ohio Department of Health.

In response to the Ohio Department of Health evaluation and the threat of license revocation, Respondent King Tree discharged personnel, hired new personnel, and conducted a series of on-site audits designed to identify problems which might result in future citations by the Ohio Department of Health. Specifically, Respondent discharged nine members of the administrative and supervisory staff. Of the nine discharged, all were white. Moreover, during the same period of time, Respondent discharged seven Registered Nurses ("RNs"), five of whom were white and two of whom were black. Additionally, nine Licensed Practical Nurses ("LPNs") were discharged, eight of whom were white and one of whom was black. Thus, Respondent discharged a total of sixteen nurses, three of whom were black and the remainder of whom were white, in an attempt to rectify the situation at King Tree. Petitioner, however, was retained in spite of the Ohio Department of Health report pertaining to the Medical Records Department. During a discussion in June, 1985 with Sidney Garfield, the President of Emery Medical Management Co., King Tree's parent corporation, Petitioner was informed that she must take affirmative action to remedy the deficiencies of the Medical Records Department. Petitioner responded by stating that she was aware of her responsibilities and that she would ensure that all medical records were properly maintained.

Petitioner's annual performance evaluation was held October 16, 1985. During such evaluation, William Hilkert, King Tree's Administrator, informed Petitioner that she had what the Court of Appeals terms as an "attitude problem." Hilkert noted specifically that Petitioner was unable to communicate satisfactorily with nursing personnel and that the lack of communication resulted in a lack of coordination in maintaining the medical records. Petitioner, in fact, agreed with Hilkert's assessment and pledged to correct the problems.

In light of Petitioner's relatively negative performance evaluation, Petitioner received a length of service pay increase of Twenty-five Cents ($.25) per hour. Based on her dissatisfaction with the amount of this increase, Petitioner filed a charge of discrimination with the Ohio Civil Rights Commission in November 1985. Petitioner withdrew the charge after she did a survey of salaries of other Accredited Record Technicians in nursing care facilities in the Dayton area. This survey revealed that Petitioner's salary was competitive with, and for the most part higher than, her counterparts at similar facilities. Indeed, of the eight Accredited Record Technicians compared in Petitioner's survey, only three were being paid more than Petitioner. On February 5, 1986, Petitioner voluntarily withdrew the charge with the Ohio Civil Rights Commission. King Tree received notice of the withdrawal on or about February 25, 1986.

On March 3 and 4, 1986, nearly one month after Petitioner withdrew her charge, a Quality Assurance Team was sent in by Emery Medical Management Co., the parent company of King Tree, to conduct an audit of the facility in order to prepare for the upcoming annual inspection by the Ohio Department of Health. The Quality Assurance Team, which consisted of three individuals, included Claudia Rossetti, an experienced medical records consultant. After completion of this evaluation, the Quality Assurance Team held an exit meeting with all department heads on March 4, 1986. As noted in the minutes of that meeting, the only pertinent deficiencies found by the team related to the Medical Records Department. During meetings held that week with Petitioner, Rossetti outlined the deficiencies in the medical records in detail and discussed methods to correct the deficiencies.

Approximately three weeks later, on March 24, 1986, Rossetti returned to assess Petitioner's progress in correcting the medical files. Upon reviewing the exact same sample of files analyzed during the initial audit in early March, Rossetti found, to her dismay, that virtually no corrections had been made. The files remained in virtually the same poor condition as in the earlier audit. Rossetti reported her findings to Hilkert, who in turn communicated them to Sidney Garfield. Based on Rossetti's evaluations, Garfield directed Hilkert to discharge Peterson from employment at King Tree.

Petitioner filed a complaint in the United States District Court in the Southern District of Ohio on March 9, 1987. An amended complaint was filed May 5, 1987. Petitioner requested relief based on alleged violations of Section 1981 of the Civil Rights Act of 1866, as amended, 42 U.S.C. §1981, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* Petitioner alleged that she was subjected to disparate treatment and discharged because she is black and had previously filed a charge with the Ohio Civil Rights Commission.

Upon completion of discovery, King Tree filed a Motion for Summary Judgment on March 28, 1988. On March 25, 1989, the District Court sustained King Tree's Motion for Summary Judgment and held that despite Petitioner's showing of a *prima facie* case of discrimination, King Tree had demonstrated sufficient nondiscriminatory reasons for its actions. The District Court further found that Petitioner was unable to offer any evidence that would create a genuine issue of material fact as to whether King Tree's asserted reason for the discharge was a pretext for discrimination. The Sixth Circuit Court of Appeals affirmed the District Court's decision on March 1, 1990.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

1. THE COURT OF APPEALS DECISION WITH RESPECT TO PETITIONER'S RACE DISCRIMINATION CLAIM IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENT.

First, Petitioner does not set forth with any specificity why certiorari should be granted in this matter. There is no conflict among the Circuits regarding an issue decided by the Court of Appeals in this case. Neither is there any issue of public importance which has not been addressed by this Court. The issues herein involve the standards for summary judgment under Rule 56, Fed. R. Civ. P, and the allocation of the burden of proof in Title VII, 42 USC §2000e, *et seq.*, disparate treatment actions, each of which have been expounded upon recently by this Court.

The standards for summary judgment are well established. Contrary to Petitioner's contentions, the District Court's holding in favor of Respondent King Tree is wholly consistent with prior Supreme Court decisions.[1] In deciding Respondent's Motion for Summary Judgment, the District Court principally relied on *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed 202 (1986), and its reading and application of such cases was correct.

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[1] Petitioner's primary contention in support of her petition for certiorari appears to be that appellate courts must issue unanimous decisions in order to affirm summary judgment dispositions rendered by federal district courts. In her brief in support of certiorari, Petitioner states:

(Footnote continued on following page.)

In *Celotex* this Court stated:

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Celotex, 477 U.S. at 321.

This Court has consistently held that summary judgment should be entered against a "party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 321. Here, Petitioner was, and remains, unable to produce evidence sufficient to establish an essential element of her discrimination claim, *i.e.*, that Respondent's actions were pretextual and, thus, impermissibly discriminatory in nature.

Petitioner's brief provides a muddled and confusing picture of what this Court requires of litigants in race discrimination cases. The case law regarding the allocation of the burden of proof in race discrimination cases is well-settled. In order to utilize circumstantial evidence to establish racial discrimination, the plaintiff

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(Footnote continued from preceding page.)

> [C]ertainly if a prominent judge of long standing in the Court of Appeals, from which it can be said has a reasonable mind, vociferously contends that there is a material fact in issue, and that King Tree report smacks of a witch-hunt, then it must be included [sic, concluded] that reasonable minds not only can differ, but in fact do differ on an issue of material fact in the instant case.

Petitioner's assertion is unsubstantiated by federal case law regarding the applicable standards for summary judgment, reflects a fundamental misunderstanding of the purpose of Rule 56 of the Federal Rules of Civil Procedure, and defies basic logic.

must make out a *prima facie* case of discrimination by a preponderance of the evidence. If the plaintiff makes out a *prima facie* case, the burden shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for its actions. Finally, if the defendant carries the burden of articulating such reasons, the plaintiff must demonstrate by a preponderance of the evidence that the legitimate reasons offered by the defendant were merely a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Undeniably, the Court of Appeals applied these rules of law appropriately.

In this appeal, Petitioner contends that the Court of Appeals erred allegedly by determining the "truth" of the District Court's findings regarding the elements of Petitioner's case. Although not entirely clear, it appears that Petitioner is arguing that the Court of Appeals resolved disputed issues of fact as opposed to applying law to undisputed factual issues. Such is not the case. The Court of Appeals majority opinion reveals that the panel did not attempt to resolve disputed issues of fact, but rather, as Rule 56 requires, focused upon the absence of material facts in dispute.

Although this Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) that "if reasonable minds could differ as to the import of the evidence," summary judgment may be inappropriate, the Court also recognized that:

> [T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there is no *genuine* issue of *material fact.*

Anderson, 477 U.S. at 248 (emphasis in the original).

In the case at bar, Petitioner has repeatedly made assertions of why she should not have been discharged; never, however, has Petitioner come forward with any evidence that suggests her discharge was discriminatory. Thus, because Petitioner bore the burden of proving that the discharge was discriminatory, the District Court and the Court of Appeals were correct in determining that Petitioner failed to produce sufficient evidence from which the trier of fact could find in her favor on that issue. Hence, summary judgment was appropriate.

As the Court of Appeals noted, the *McDonnell Douglas-Burdine* framework did not require King Tree to prove that its reason for terminating Petitioner was legitimate and nondiscriminatory. Rather, Petitioner bares the burden of proving, by a preponderance of the evidence, that the employer's legitimate, nondiscriminatory reason for the discharge was in fact a pretext for discrimination. *Lewis v. Sears, Roebuck & Co.*, 845 F.2d 624 (6th Cir. 1988). *See also Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980). In order to prove pretext, Petitioner was charged with demonstrating that similarly situated white employees were treated differently, or that King Tree's business judgment was "so ridden with error that the defendant could not honestly have relied upon it." *Lieberman*, 630 F.2d at 65. *See also Daniels v. Board of Educ. of Ravenna City School Dist.*, 805 F.2d 203 (6th Cir. 1986). As the Sixth Circuit stated in a similar matter:

> Disputation of the facts underlying [defendant's] legitimate business reason for demoting [plaintiff] is not sufficient to carry appellant's burden.

Irvin v. Airco Carbide, 837 F.2d 724, 726 (6th Cir. 1988).

In no way can Respondent's business judgment be said to be either so ridden with error or so incredible as to be unworthy of belief.[2] The facts are quite straightforward. Faced with the threat of license revocation, Emery Medical Management was forced to take affirmative managerial steps to remedy the situation at King Tree. Those affirmative steps included, among other things, discharging individual employees who were unable to assist in an overhaul and improvement of operations. As noted, the overwhelming majority of those discharged were white. Moreover, they were discharged immediately while Petitioner was given an opportunity to correct the medical records deficiencies.

Significantly, Petitioner offers excuses for her poor performance but in no way offers any evidence of discrimination. As the First Circuit Court of Appeals has cautioned, "merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent." *White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir. 1984). Throughout the course of this litigation, Peterson has proffered excuse upon excuse for her poor maintenance of the medical records. Petitioner's excuses turn on her assertion that despite her job description, she was required only to monitor the records, that the uncooperativeness of others prevented the maintenance of the records, and that other personnel were supposed to complete the medical records. Petitioner was never able to advance any evidence of specific instances of uncooperativeness, efforts on her part to correct the

[2] Even Judge Edwards' dissent, which Petitioner relies upon in support of her petition for certiorari, concurred with the district court's conclusions about Petitioner's race discrimination claim.

deficiencies in the medical records, or evidence that personnel other than herself were responsible for completing the medical records. The Court of Appeals was correct in holding that such conclusory allegations could not possibly sustain Petitioner's burden to prove pretext.

Contrary to Petitioner's allegations, it is this critical absence of material evidence that the District Court and the Court of Appeals properly focused on in analyzing the apporopriateness of summary judgment. In short, Petitioner failed to produce any evidence of discrimination and failed to demonstrate that Respondent's asserted reason for the discharge was unworthy of belief. Thus, there was no evidence presented that even tended to establish pretext.

Petitioner cites this Court's language in *Patterson v. McLean Credit Union*, _____ U.S. _____, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), that other means may be used to demonstrate discrimination, such as "by presenting evidence of Respondent's past treatment of Petitioner, including the instances of racial harassment." *Patterson*, 109 S. Ct. at 2378. Although this Court recognized the viability of several methods to prove pretext, *Patterson* does not mandate Petitioner's rigid conclusion that under all circumstances, allegations of other treatment of racial harassment will be conclusively demonstrative of pretext. The *Patterson* Court stopped short of rendering such a conclusion and stated instead:

> While we do not intend to say this evidence necessarily would be sufficient to carry the day, it cannot be denied that it is one of the various ways in which petitioner might seek to prove intentional discrimination on the part of respondent.

Patterson, 109 S. Ct. at 2378.

Contrary to Petitioner's assertions, the Court of Appeals satisfied the requirements of *Patterson*. The Court of Appeals addressed Petitioner's claims of harassment and all other evidence she submitted. The instances that Petitioner would use as other evidence, however, simply were not sufficient to create a genuine issue of material fact with respect to pretext. For example, Petitioner asserts that Hilkert's alleged refusal to shake her hand upon meeting her, together with his supposedly siding with white nurses over medical records issues demonstrated pretext. Such conclusory allegations do not come close to being sufficient evidence from which a trier of fact could reasonably find pretext. Virtually identical allegations have been held not "sufficient to raise an inference of discrimination." *Shah v. General Electric Co.*, 816 F.2d 264 (6th Cir. 1987). More importantly, it was uncontroverted that Sidney Garfield, the President of King Tree, not Hilkert, made the actual decision to terminate Petitioner. Thus, any evidence with respect to the actions of Hilkert are not evidence as to what motivated Garfield's decision to discharge Petitioner. *Cf. Price Waterhouse v. Hopkins*, _____ U.S. _____, 109 S. Ct. 1775, 1804, 104 L. Ed. 2d 268 (1989) (O'Connor, J., concurring). In this case, the vague and ambiguous allegations of discriminatory treatment, which Petitioner suggests fall under the ambit of *Patterson*, simply do not create an inference of discrimination.

2. RESPONDENT WAS CLEARLY ENTITLED TO SUMMARY JUDGMENT ON PETITIONER'S RETALIATION CLAIM.

The Court of Appeals was correct in affirming the District Court's finding that the Petitioner failed to provide sufficient evidence to support her claim for retaliatory discharge. Here again, Petitioner fails to indicate why certiorari should be granted beyond arguing that the Court of Appeals decision is erroneous. Petitioner points to two pieces of evidence which she contends are demonstrative of a retaliatory discharge. First, Petitioner asserts that the timing of her discharge creates an inference of discrimination. Second, Petitioner contends that an alleged statement made by Garfield that he did not like his employees "going public" also supports an inference of discrimination.

In order to establish a *prima facie* case of retaliation, Petitioner was required to establish that (1) she engaged in protected activity, (2) she was subjected to adverse employment action, and (3) a causal link existed between the protected activity and the adverse action. *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986); *Jackson v. RKO Bottlers of Toledo*, 743 F.2d 370 (6th Cir. 1984). Here, Petitioner did not come forward with evidence sufficient to establish that a causal link existed between her filing of the charge of discrimination and her discharge. Thus, summary judgment was appropriate.

The District Court correctly held that when the timing of the discharge and the ambiguous statement regarding "going public" is the only evidence of retaliation produced by the plaintiff, summary judgment is appropriate. This conclusion is supported by this Court's decision in *Anderson v. Liberty Lobby, supra*, where the Court unequivocally recognized that "the mere existence of a scintilla of evidence in support of the

plaintiff's position will be insufficient" to withstand summary judgment. *Anderson*, 477 U.S. at 252. Given the uncontroverted evidence before the District Court regarding Petitioner's complete failure to perform her duties, the fact the Respondent's license was in jeopardy, and Respondent's consistent treatment of all similarly situated employees, the District Court was clearly correct in deciding that no evidence existed on which a fact finder could reasonably find for Petitioner.

Other federal courts have found isolated statements that were much more telling and specific than that alleged here insufficient to withstand summary judgment. For example, in *Grisby v. Reynolds Metals Company*, 821 F.2d 590 (11th Cir. 1987), the Court held that an isolated statement revealing a sexual bias was insufficient to withstand an employer's motion for summary judgment. There the court stated:

> Finally, while [the supervisor's] alleged statement regarding the "rough characters" the traffic manager would have to deal with might be somewhat probative if combined with other more substantial evidence, it is too indefinite to justify by itself an inference of discriminatory intention Reynold's part.

Id., at 597.

In light of the overwhelming evidence presented to the District Court that Petitioner failed to adequately perform her duties and responsibilities and her virtual admission of the same, the vague and conclusory allegations she asserted regarding her claim of retaliation clearly could not withstand Respondent's Motion for Summary Judgment. Thus, the Court of Appeals was correct in affirming the District Court's grant of summary judgment on the retaliation claim.

CONCLUSION

This Court should deny this Petition for Certiorari to the Sixth Circuit Court of Appeals and affirm its decision regarding the District Court's order for summary judgment.

Respectfully submitted,

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